A ASHWANI KUMAR AND ORS. ETC.

v.

STATE OF BIHAR AND ORS.

DECEMBER 16, 1996

B [A.M. AHMADI, CJ., S.B. MAJMUDAR AND SUJATA V. MANOHAR, JJ.]

Service Law—Recruitment—Planned Expenditure—Budgetary sanction is a sine qua non—Appointments dehors budgetary sanction and on non-existing vacancy—Held, unauthorised and illegal—Tuberculosis Eradication Scheme—Appointment of 6000 employees against sanctioned posts of 2250—Breach of procedure of recruitment—All appointments held unauthorised and illegal—Claim of regularisation—Held, unsustainable.

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D *Termination of Services—Natural Justice—Principles of—Compliance with.*

Eradication of Tuberculosis was taken up as a part of 20 Point Programme in planned expenditure. The then Deputy Director, Health Department of the Government of Bihar, in-charge of Tuberculosis for a number of years, was made the Deputy Director of the Scheme and the Chairman of Selection Committee constituted by the Government, to recruit 2250 Class III and Class IV employees on posts created to implement the Scheme. About 6000 persons were appointed by the Chairman without any written orders. He directed many of them to be adjusted by transfer by District Medical Officers and shuffled their payment of salaries by turns. Regularisation of many of such persons including most of the appellants was made. When petitions under Article 226 of the Constitution seeking payment of salaries were made, an Enquiry Committee was constituted to find out whether the appointments made were valid and whether salaries could be paid to such employees. The Vigilance Department appointed to enquire into the matter reported that the Chairman had violated the rules of recruitment. Pursuant to the direction of the High Court, a Screening Committee was constituted which found that the initial appointments made were in violation of the instructions issued by the Government and that the Chairman, appointing authority circumvented the rules by making adjustment by transfer without verifying the

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qualifications, eligibility or disclosing previous places whereat the candidates appointed had worked etc. etc. Relying on the report, all the appointments were cancelled. When their legality was questioned in the Writ Petitions, the High Court upheld the Government action. Hence these appeals by special leave.

This group of appeals was heard by the Division Bench of this Court. There arose a difference of opinion between the two Judges. K. Ramaswamy, J. confirming the order of the High Court held that even though it was open to the Government to create posts or to fill up the posts independently of existence of any law or statutory rules, the said exercise had to be consistent with the rights guaranteed under Articles 14 and 16(1) of the Constitution of India; that when planned expenditure is required to be spent, budgetary sanction is mandatory and in the present case when some of the employees were sent for one month's training, posts were created and budgetory sanction was obtained thereby abusing the absolute power, the Chairman appointed 6000 persons at his whim and wagery; that procedure for appointment to Class III and Class IV posts was given a go by and instead casual appointments were made without any letter of appointment to fill up even non-existing vacancies; that existence of post or vacancy was a *sine qua non* for making appointments to such existing posts or vacancies available, the recruitment made to these posts was patently illegal and without authority of law; that when initial appointments were in violation or in negation of the rules or when there were no orders for appointment, to confer permanency of appointment to such posts by regularisation in violation of the executive instructions or rules was itself subversive of the procedure and, therefore it was futile to issue writs as prayed for.

Hansaria, J. quashed the termination orders qua the appellants, holding that for the purpose of recruiting Class III and Class IV employees in the 20 Point Programme the procedure prescribed by the Office Memorandum dated 3.2.1980 was not required to be followed and that even though the Chairman was not justified in giving direct appointment to about 6000 persons when there were only 2500 sanctioned posts, all the persons so employed had not abetted, aided or instigated the Chairman in doing so, and, therefore, even though a wrong doer or a sinner has to be punished and also those who aid, abet or instigate them but not those regarding whom only a doubt existed and that about 2500 persons could

A have been appointed by the Chairman and as there was material on record to show that regular appointments had also been made and as it was not possible to know who the regularly appointed persons were, the appellants, whose number was 1363, might be among those who were regularly appointed and as it was doubtful whether these 1363 appellants could be said to have been irregularly appointed, termination orders qua them were required to be set aside.

On account of this difference of opinion between the two judges, these appeals had been placed before the larger bench.

C The appellants submitted that the Deputy Director, Health Department of the Government of Bihar having been made the Chairman of Selection Committee was duly empowered to appoint Class III and Class IV employees on the programme and looking to the urgency of the programme the appointments had to be made on a war footing and that D was how 6000 appointments were made by him in due exercise of his authority and these posts not being born on any regular cadre in the State service, the detailed method of recruitment for filling up vacancies for such a programme was not required to be followed; that these appointments on *ad-hoc* basis were ultimately duly approved by the State when the Committee constituted for the purpose had found them to be valid and accordingly E the employees were regularised and thereafter it was not open to the State to nullify these appointments and all the 6000 appointments could not have been invalidated in a wholesale manner which was contrary to the basic principles of natural justice; that for no fault of theirs these employees who had continued for more then 10 years service in many cases and who F were even subsequently promoted could not have been removed and hence on the principle of fairness, equity and even invoking mercy jurisdiction of the Court they should have been continued in service.

The respondent State submitted that all the initial appointments on *ad hoc* or daily rated basis made by the Chairman, Selection Committee G were patently unauthorised and illegal, being more than the sanctioned posts and made in violation of the established procedure for recruitment; that the appointments were not backed up by financial budgets, they were totally unauthorised and could not have been countenanced at all and, therefore, their Regularisation was wholly arbitrary, null and void and of H no legal effect and as there was no material to show who could be fitted in

against the sanctioned posts the State was justified to set aside all these appointments; that there was no violation of principles of natural justice as public notices were given inviting such employees to put forward their cases and there was no question of tempering justice with mercy as all these incumbents were illegally appointed.

The points raised for determination were (i) Whether the appointments of the Class III and Class IV employees on the Tuberculosis Eradication Scheme as a part of 20-Point Programme were legal and valid; (ii) Whether the confirmation of these employees was legally justified; (iii) Whether principles of natural justice were violated while terminating services of all these 6000 employees appointed (iv) What relief, if any, could be granted to the appellants.

Disposing of the appeals, this Court

HELD : 1.1. Eradication of tuberculosis was taken up as a part of 20-Point Programme under the Planned Expenditure. Director, Tuberculosis Centre at Patna was made Chairman of the Selection Committee, entrusted with the task of recruiting 2250 Class III and Class IV employees. The budgeted expenditure for recruitment of 2250 employees on these sanctioned posts was a planned expenditure. The committee appointed approximately 6000 persons on the sanctioned 2250 posts. Under these circumstances their initial entry must be held to be totally unauthorised, incompentent and void. When these recruitments were not supported by any budgetary grants there will be no occasion to make available finances to meet their salary expenses. These 6000 employees were recruited completely violating the established norms and procedures of recruiting Class III and Class IV employees as laid down by the State Government from time to time. All these recruitments made were arbitrary, capricious and were null and void. Such recruitment in Public Services could not have been effected in such a cavaliar fashion. Even if the recruitment was in a Government Scheme under 20-Point Programme it was to be carried out as per planned expenditure. When planned expenditure is required to be incurred, budgetary sanction is a *sine qua non*. The Government Orders concerning recruitment to Class III and IV employees were not followed while recruiting *ad hoc/daily* wage employees at the initial stage. The Govt. Resolution of 25.3.1983 stating that in supersession of all the previous orders, the State Government had decided

A to constitute Selection Committee under the T.B. Programme, had to be read along with the Government Orders dated 3.12.1980 and not *dehors* them. The supersession of the previous orders as contemplated by the Resolution was only to the limited extent that the Selection Committee mentioned in the Resolution will be the Committee for appointing such persons on the concerned programmes and to that extent the recruiting authority as mentioned in the earlier Government Orders would stand superseded but it did nothing more than that. The procedure for recruitment, however, would remain the same even for the newly constituted Selection Committee. It is axiomatic that unless there is vacancy there is no question of filling it up. There cannot be an employee without a vacancy or post available on which he can work and can be paid as per the budgetary sanctions. In the instant case, the State authorities were justified in refusing to release salaries for paying this unauthorised army of staff. They were all *persoa non grata* and were not employees in the real sense of the term. The appointments of 6000 employees as made in the Tuberculosis Eradication Scheme were *ex facie* illegal. As they were contrary to all recognised recruitment procedures and were highly arbitrary, they were not binding on the State. [139-B-H; 140-A-C; 141-H; 142-B; E-H]

1.2. Question of confirmation or regularisation of an irregularly appointed candidate would arise if the concerned candidate is appointed in an irregular manner or on *ad hoc* basis against an available vacancy which is already sanctioned. But if the initial entry itself is unauthrised and is not against any sanctioned vacancy question of regularising the incumbent on such a non-existing vacancy would never survive for consideration and even if such purported regularisation or confirmation is given it would be an exercise in futility. Under these circumstances there was no occasion to regularise them or to give them valid confirmation. The so-called exercise of confirming these employees, therefore, remained a nullity. Any posting which is *dehors* the budgetary grant and on a non-existing vacancy would be outside the sanctioned scheme and would remain totally unauthorised. No right would accrue to the incumbent of such an imaginary or shadow vacancy. Question of regularisation in any service including any Government service may arise in two contingencies. Firstly, if on any available clear vacancies which are of a long duration, appointments are made on *ad hoc* basis or daily wage basis by a competent authority and are continued from the time to time and if it is found that the concerned incumbents have continued to be employed for a long period of time with or without any

artificial breaks, and their services are otherwise required by the institution which employs them a time may come in the service career of such employees who are continued on *ad hoc* basis for a given substantial length of time to regularise them so that the concerned employees can give their best by being assured security of tenure. But this would require a pre-condition that the inital entry of such an employee must be made against an available sanctioned vacancy by following the rules and regulations governing such entry. The second type of situation in which the question of regularisation may arise would be when the inital entry of the employee against an available vacancy is found to have suffered from some flaw in the procedural exercise though the person appointing is competent to effect such initial recruitment and has otherwise followed due procedure for such recruitment. A need may then arise in the light of the exigency of administrative required for waiving such irregularity in the initial appointment by competent authority and the irregular initial appointment may be regularised and security of tenure may be made available to the concerned incumbent. But even in such a case the initial entry must not be found to be totally illegal or in blatant disregard of all the established rules and regulations governing such recruitment. In any case back door entries for filling up such vacancies have got to be strictly avoided. However, there would never arise any occasion for regularising the appointment of an employee whose initial entry itself is tainted and is in total breach of the requisite procedure of recruitment and especially when there is no vacancy on which such an initial entry of the candidate could ever be effected. Such an entry of an employee would remain tainted from the very beginning and no question of regularising such an illegal entrant would ever survive for consideration, however competent the recruiting agency may by. The appellants fell in this latter class of cases. They had no case for regularisation and whatever purported regularisation was effected in their favour remained an exercise in futility. Even though some training was given under the direction of the Government to certain candidates the recruitment made being in excess of the available vacancies would still remain unauthorised and illegal. Even after training when recruitment is to be made it must be made on available vacancies or sanctioned posts under the Scheme and that too after following due procedure of recruitment. That was never done. [143-B-D; 144-B-H; 145-A-B; 147-C-D]

1.3. Principals of natural justice cannot be subjected to any straight jacket formula. They will vary from case to case, from circumstance to

A circumstance and from situation to situation. The basic principles of natural justice cannot be said to have been violated by the Committee which ultimately took decision on the basis of the personal hearing given to the concerned employees and after considering what they had to say regarding their appointments. Whatever was submitted by the concerned employees was taken into consideration and then the committee came to a B firm decision to the effect that all these appointments made were vitiated from the inception and were required to be set aside and that was how the impugned termination orders were passed against the appellants. On the facts of these cases, therefore, it could not be said that principles of natural justice were violated or full opportunity was not given to the concerned C employees to have their say in the matter before their appointments were recalled and terminated. [148-E; 150-F-H; 151-A]

1.4. When 6000 appointees were found to have been illegally loaded on the State exchequer and when there were only 2250 sanctioned posts, in the absence of clear data as to who were the senior most and which were D the sanctioned posts available at the relevant time against which they could be fitted it would be impossible to undertake even a jettisoning operation to offload the removable load of excess employees amounting to 3750 by resorting to any judicial surgery. Once the source of their recruitment was found to be tainted all of them had to go. [151-C-D]

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1.5. These 6000 employees were got employed over at least a decade. Many of them served for number of years and got confirmed. For no fault of theirs they found themselves stranded in life midstream. Many might have got overaged. Many of them also got trained under the second phase of the F Programme. Under these circumstances justice would require that some effort to salvage their situation if possible may be made when the State under-takes a fresh exercise to fill up the sanctioned posts under the Tuberculosis Eradication Programme which had come to stay. Tuberculosis is still not eradicated in the State of Bihar and the Programme is to last for couple of more years and may be it may assume a semi-permanent G status. There are 2250 sanctioned posts or it may be that some more sanctioned posts may see the light of the day in the near future. It would be appropriate to direct the State to undertake that exercise at the earliest and while doing so after following the due procedure of recruitment and the rules governing the same, give an opportunity to these 6000 unfortunate H creatures to compete for the said posts in the future recruitment that may

be undertaken by the State and in the process because of the experience which they have gathered in their past service under the Tuberculosis Programme and the training which they might have received pursuant to the Government Order dated 31.7.1987, due weightage also be given to them while considering their eligibility for being recruited in service as and when such future exercise is undertaken. If no statutory body composed of high-ranked officials for recruitment to Class III and Class IV employees is in vogue, the State is directed to constitute a committee consisting of three members, viz., (a) a member of the Public Service Commission; (b) a senior IAS officer, i.e., the Additional or Joint Secretary of the Health Department; and (c) a senior officer, i.e., the Director or Additional Director of Health Services, to select the candidates. The Additional or Joint Secretary of Health Department shall be the Chairman of the Committee. The respondent-State will constitute such a committee preferably within three months of receipt of this order. It would be open to all the appellants or those appointed under the Scheme who might not have challenged their termination orders before any competent court uptil now, to apply for selection to the concerned Class III and Class IV posts. The committee would in their cases as first step, verify and satisfy itself of the credentials of such candidates. The committee may fix total number of marks to be obtained by the candidates for being treated to have passed the selection test. The committee if satisfied about the credentials and other particulars of the appellants or those appointed under the Scheme may allot additional marks to them for each of the three years and more for which they might have worked, at the rate of 2 marks for each completed year of continuous working, upto a maximum of 6 marks, for each candidate. Candidates appointed who are found to have undertaken training pursuant to the Government direction dated 31.1.1987 may be awarded 2 additional marks for the training so received. Those 2 marks will be in addition to the 6 marks which are to be awarded on completion of meritorious and honest service by the concerned employees. If the concerned candidates who were earlier appointed are found by the committee to be otherwise eligible for being appointed to Class III and IV posts as per the relevant rules and regulations and if on the basis of the marks allotted to them as aforesaid they become eligible to be appointed besides other competing candidates, then if they are found to have become age barred the condition of age for recruitment of such candidates should be relaxed appropriately so as to entitle such candidates to be considered for selection. The committee shall select all candidates on merits following the prescribed procedure in the appropriate circulars and

rules and shall also follow the rules of reservation as in vogue and prepare the merit list and should submit it to the Government. In the event of selection and appointment of erstwhile daily-rated employee or employees, who were inducted under the scheme the entire proved period during which they had worked as daily wager and/or confirmed employees will be computed for the purpose of pensionary and other retiral benefits but they will not be entitled to claim any inter se higher seniority in the selection made by the committee or for any promotion on the basis of their previous service.

[152-C-H; 153-A; E-H; 154-B-G; 155-C-D]

H.C. Puttaswamy & Ors. **v.** *The Hon'ble Chief Justice of Karnataka High Court, Bangalore & Ors.,* **JT (1990) 4 SC 474 and** *Jacob M. Puthuparambil & Ors. Etc. Etc.,* **[1991] 1 SCC 28, distinguished.**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 10758-59 of 1995 Etc.

From the Judgment and Order dated 6.5.94 of the Patna High Court in C.W.J.C. No. 5163 and 7527 of 1993.

Dr. Rajeev Dhavan, Gopal Singh, A. Sharan, Imtiaz Ahmed, E.C. Vidyasagar, K.D. Prasad, A.N. Bardiyar, I.N. Jha, A.K. Jha, Jayant Bhushan, S.K. Sinha, P.P. Tripathi, Ejaz Maqbool, K.K. Gupta, A.K. Pandey, R.K. Singh, Ranjit Kumar, Irshad Ahmad, R.P. Singh, (Sumant Bhardwaj) for Ms. Mridula Ray Bhardwaj, U.S. Prasad, B.B. Singh and A.P. Medh for the appearing parties.

The Judgment of the Court was delivered by

S.B. MAJMUDAR, J. : Leave granted in S.L.P. (C) Nos. 6174 of 1992, 14275 of 1994, 7410 of 1995 and S.L.P. (C) No. 24553 (CC 4638/95).

This group of appeals, on grant of special leave to appeal against the common judgment of Patna High Court in CWJC No. 5163 of 1993 and batch decided on 6th May 1994, has been placed before this larger Bench by the orders of Hon'ble the Chief Justice on account of difference of opinion between two learned judges of this Court, K. Ramaswamy, J. and Hansaria, J., constituting the Division Bench which earlier heard this group of matters. Before the main points for difference are highlighted and the contentions of respective contesting parties are noted, it would be necessary to note at the outset the backdrop facts leading to these proceedings.

Backdrop Facts A

One Dr. A.A. Mallick, Deputy Director, Health Department of the Government of Bihar, was in charge of Tuberculosis for a number of years while he was working as a member of the medical service of the State of Bihar. He was Director of the Tuberculosis Centre at Patna. Eradication of Tuberculosis was taken up as a part of 20-Point Programme in planned expenditure. The activities in the Tuberculosis Centre at Patna were extended to various districts. Since Dr. Mallick happened to be the Director of the Centre, he was made Deputy Director of the Scheme. The Government has also issued directions to the District Medical Officer to abide by the instructions of Dr. Mallick in implementation of the programme. He was made the Chairman of Selection Committee constituted by the Government consisting of himself, Assistant Director of Pilaria and a senior officer representing Scheduled Castes/Scheduled Tribes to recruit 2250 Class III and Class IV employees on posts created to implement the Scheme in addition to around 800 to 900 staff in Patna Centre in all categories. Taking advantage thereof, the undisputed fact is that, he appointed around 6000 (as found by the Committee) while the Government asserts them to be approximately 7000. Be that as it may, not less than 6000 persons were appointed by Dr. Mallick without any written orders. He directed many of them to be adjusted by transfer by District Medical Officers and some of them had produced fabricated appointment orders. He shuffled their payment of salaries by turns. Another device adopted in the macabre episode was to make the employees go on strike and when some sensitive M.L.As. raised the question, on the floor of the State Legislative Assembly, of illegal appointments made by Dr. Mallick, the Government initially posed the appointments to be legal and justified his action to be valid. Later, when facts themselves proved their faulty admission, they made amends before the Assembly and the Government made an elaborate statement apprising the House that the information furnished earlier was not correct.

Due to the agitation, the Director and Joint Section to the Government, Health Department had issued directions to regularise the services of daily-rate Class III and Class IV employees. Taking aid thereof, it is claimed that regularisation of many of them including most of the appellants, was made. When alarming bells rang around portals of Patna High Court by filing petitions under Article 226 of the Constitution seeking

A payment of salaries, the High Court, though initially in some cases directed to enquire into the cases and to pay salaries, later found if difficult to cope up with the situation. So an Enquiry Committee was constituted to find out whether the appointments made by Dr. Mallick were valid and whether salaries could be paid to such employees.

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In the meanwhile, the Government also directed the Vigilance Department to enquire into the matter and on 7th May 1991, the Vigilance Department in its report pointed out that Dr. Mallick had violated the rules of recruitment and in collusion with other officers had appointed daily-rated Class III and Class IV employees. Pursuant to the direction of the C High Court, a Screening Committee was constituted which sought to serve notice on the employees. When the Deputy Director went to the Centre at Patna to serve the notice on the employees, he was man-handled resulting in an ugly law and order situation. In consequence, notices were published on two different dates in different newspapers inviting submission of the D claims by all the employees appointed by Dr. Mallick, together with supporting material justifying their appointments. Different dates of hearing by the Committee were staggered. About 987 employees appeared before the Committee and submitted their statements. In the meanwhile, relevant records were burnt out. The High Power Committee in the absence of authentic record was constrained to depend upon the statements made by E the employees before it. After hearing them and considering the record placed before it, the Committee found that Dr. Mallick did not make any order of appointment on daily-wage basis by following due procedure. It found it difficult to accept even the orders of confirmation. In that view, the Committee found that the initial appointments made by Dr. Mallick F were in violation of the instructions issued by the Government. Therefore, they were found to be illegal appointments. The Committee also found that Dr. Mallick circumvented the rules by making adjustment by transfer without verifying the qualifications, eligibility or disclosing previous places whereat the candidates appointed had worked and dates of their appointment and by transferring them to the respective places by cyclostyled G orders. He directed the District Medical Officers to verify the credentials and then to appoint them temporarily. The Committee also noted that the third category was of persons who were appointed by producing fabricated orders of appointment. Consequently, it directed to cancel all the appointments made by Dr. Mallick. On receipt of the report and on its considera- H tion, the Government found them to be invalid and illegal and all the

appointments were cancelled. When their legality was questioned in the writ petitions filed under Article 226, the High Court upheld the Government action. Thus these appeals by special leave.

When this group of appeals was finally heard by the Division Bench of this Court consisting of K. Ramaswamy, J. and Hansaria, J., as noted earlier, on hearing the arguments of learned counsel appearing for the contesting parties, there arose a difference of opinion between the two learned judges, K. Ramaswamy, J., came to the following conclusions :

1. Even though it was open to the Government to create posts or to fill up the posts independently of existence of any law or statutory rules made under the proviso to Article 309 of the Constitution to that effect, the said exercise had to be consistent with the rights guaranteed under Articles 14 and 16(1) of the Constitution of India.

2. When planned expenditure is required to be spent, budgetary sanction is mandatory. In the present cases when some of the employees were sent for one month's training posts were created and budgetary sanction was obtained. The cases at hand were unique and the device adopted by Dr. Mallick was in flagrant violation of the norms of administrative procedure known to law. He had given decent burial to procedure prescribed by the Government. Abusing the absolute power secured in his hands, he appointed 6000 persons at his whim and wagery.

3. Procedure for appointment to Class III and Class IV posts was given a go-by. Instead causal appointments were made without any letters of appointment to fill up even non-existing vacancies.

4. Existence of post or vacancy was a *sine qua non* for making appointments to such existing posts or vacancies and as there were no 6000 posts or vacancies available, the recruitment made by Dr. Mallick to these posts was patently illegal and without authority of law.

5. When initial appointments were in violation or in negation of the rules or in other words when there were no orders for appointment there would remain no question of regularisation of such initially illegal appointments. To confer permanency of appointment to the posts by regularisation in violation of the executive instructions or rules is itself subversive of the procedure.

A 6. Without following due procedure prescribed under the circulars, regularisation of services of daily-wage employees could not be effected.

7. Principles of natural justice were not required to be followed in the present cases. Even otherwise there was due compliance with these principles.

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8. As all the appointments were made in flagrant breach of the procedure and the executive instructions and amounted to blatant abuse of the centralised power held by Dr. Mallick and subversive of discipline, it was futile to issue writs as prayed for.

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9. However Ramaswamy, J. was inclined to issue 11 directions in para 36 of his judgment for future recruitment of class III and IV employees in the Tuberculosis Eradcation Programme, providing certain safeguards for considering the feasibility of recruiting the present appellants on these posts.

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In view of the aforesaid findings and conclusions K. Ramaswamy, J. was inclined to dispose of the appeals by confirming, subject to the aforesaid directions, the order of the High Court dismissing the writ petitions.

E On the other hand Hansaria, J., reached the following conclusions and findings :

1. For the purpose of recruiting Class III and Class IV employees in the 20-Point Programme the procedure prescribed by Office Memorandum dated 3rd December 1980 was not required to be followed.

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2. It could not be said that the procedure visualised by Office Memorandum dated 3rd December 1980 was not followed at all regularising the appellants.

G 3. Non-advertisement of posts in newspapers did not cause any infirmity to the regularisation.

4. Non-information to the Employment Exchange had caused no dent to the appointments.

H 5. The question of illegality in appointment of general candidates on

the ground of non-reservation did not arise as the material showed that there was reservation of SC/ST candidates. A

6. Material on record showed that in some cases regularisation was in a pursuance of the recommendations of a properly constituted Selection Committee. B

7. Merit list/panel was prepared in some cases pursuant to O.M. of 3rd December 1980. But it could not be said that it was done in all cases. However, there was no justification in finding infirmity in all the appointments because of lack of material on record. C

8. Principles of natural justice were not fully complied with before terminating the services of the appellants. However, that had no nullifying effect so far as the present proceedings are concerned as they were heard by this Court and consequently on that ground termination orders could not be set aside. D

9. Even though Dr. Mallick was not justified in giving direct appointment to about 6000 persons when there were only 2500 sanctioned posts, all the persons so employed had not abetted, aided or instigated Dr. Mallick in doing so, and, therefore, even though a wrong doer or a sinner has to be punished and also those who aid, abet or instigate them but not those regarding whom only a doubt existed. E

10. About 2500 persons could have been appointed by Dr. Mallick and as there was material on record to show that regular appointments had also been made (how many, we do not not know) and as it is not possible to know who the regularly appointed persons were the appellants, whose number is 1363, may be among those who were regularly appointed. F

Consequently in view of the aforesaid findings Hansaria, J. was inclined to hold that justice had to be tempered with mercy in the light of Article 21 of the Constitution of India and as it was doubtful whether these 1363 appellants could be said to have been irregularly appointed, termination orders qua them were required to be set aside. It was made clear by Hansaria, J., that the said order would not in any way be taken advantage of except by the 1363 appellants before the Court. As noted earlier it is this difference of opinion between the two learned judges constituting the G H

A Division Bench, that has triggered off the present proceedings before this larger Bench.

Rival Contentions

B Learned counsel for the appellants vehemently submitted that there was ample evidence on the record of these cases to show that Dr. Mallick was the appointing authority and was duly empowered to appoint Class III and Class IV employees on the programme regarding eradication of Tuberculosis which was taken up as a part of 20-Point Programme in the Planned Expenditure by the State of Bihar. It was further contended that C the Government Order of 3rd December 1980 did not apply to such appointments. That looking to the urgency of the Programme the appointments had to be made on a war-footing and that is how 6000 appointments were made by Dr. Mallick in due exercise of his authority so that Tuberculosis Eradication Programme could be put on an effective and strong D footing. It was further submitted that these were not posts born on any regular cadre in State Service and consequently the detailed method of recruitment for filling up vacancies for such a Programme was not required to be followed, It was next contended that Dr. Mallick had given due importance to the policy of reservation as applied by the State while E effecting these appointments. That in any case these appointments on *ad-hoc* basis were ultimately duly approved by the State when the Committee constituted for the purpose had found them to be valid and accordingly the employees were regularised. That thereafter it was not open to the State of Bihar to nullify these appointments by one stroke of pen. Even that apart all the appointments effected by Dr. Mallick which were about F 6000, could not have been invalidated in a wholesale manner which was contrary to the basic principles of the natural justice. That the so-called hearing given by the Committee even prior to its constitution could not be said to be a hearing at all and hence termination orders were null and void. It was ultimately submitted that for no fault of theirs these employees who G had continued for more then 10 years in service in many cases and who were even subsequently promoted could not have been removed wholesale and hence on the principle of fairness equity and even invoking mercy jurisdiction of the Court they should have been continued in service. That, if at all, they were victims at the hands of Dr. Mallick but could not be said H to be abettors and should have been dealt with in a humanitariam manner.

It was contended that on the same lines on which this Court in the case of *H.C. Puttaswamy & Ors.* v. *The Hon'ble Chief Justice of Karnataka High Court, Bangalore & Ors.*, JT (1990) 4 SC 474 permitted the irregularly appointed employees to continue on service without a break, the present appellants also should be directed to be so continued in service after giving them reinstatement with all consequential benefits. Dr. Dhavan, learned senior counsel appearing for the appellants in appeals which were earlier delinked from this group but which were subsequently placed along with the group for disposal, namely, civil appeal arising out of S.L.P.(C) No. 14275 of 1994 and C.A. Nos. 10811-28 of 1995, submitted that 8 employees in civil appeal arising out of S.L.P.(C) No. 14275 of 1994 were not appointed by Dr. Mallick but were appointed by Dr. Mithilesh Kumar and, therefore, their appointments stood on a separate footing and could not have been nullified by adopting the general yardstick for voiding all the appointments made by Dr. Mallick. So far as the Civil Appeals Nos. 10811-28 of 1995 were concerned Dr. Dhavan submitted that appointments made by Dr. Mallick were in two phases, the first phase was reflected by the Government Order dated 25th March 1983 wherein Dr. Mallick had appointed number of employees under the Scheme. But the second phase started pursuant to the Government Order dated 31st January 1987 whereunder a programme was instituted for training Tuberculosis Attendants and Tuberculosis Assistants and once they were given training such candidates became entitled to be appointed on regular basis in this Programme and as they had been so trained there was nothing wrong in continuing them in service. Dr. Dhavan also submitted that the Tuberculosis Eradication Scheme under 20-Point Programme was entirely a separate Scheme undertaken by the State of Bihar in collaboration with the Central Government wherein the expenses for the infrastructure were to be shared by the State Government as well as Central Government and there was no question of any posts being created in the regular service of the State. Under these circumstances the rigour of the procedure of recruitment to State service as laid down by the Notification of 3rd December 1980 could not be applied to fill up the vacancies on this Scheme. Consequently no fault could be found with the manner of recruitment adopted by Dr. Mallick especially when a Committee, duly constituted under the Scheme by the State Government, had cleared these appointments and directed regularisation of these *ad hoc* employees as initially

A appointed by Dr. Mallick. Dr. Dhavan further submitted that these posts were sanctioned from time to time by State Government. That there was nothing wrong with the regularisation of these employees and all of them could not have been terminated by one stroke of pen contrary to all the basic established principles of natural justice and fairplay. Ultimately it was
B contended that in any case by tempering justice with mercy these employees who have now become age-barred should not be thrown out of service after number of years when they had been recruited in service for no fault of theirs. It was, therefore, submitted by Dr. Dhavan towing the line of other learned advocates for the appellants that the appeals should
C be allowed and all the prayers put forward in the writ petitions filed in the High Court should be granted. In the written submissions filed in Civil Appeal Nos. 10813-10985 of 1995 it was submitted that the 20-Point Programme announced by Government of India underscored the need for eradicating the dreaded disease Tuberculosis (T.B.). In Bihar State alone
D as per Government information in 1976 about half the population (current population 10 crores) was striken with T.B. and the annual death toll was feared to be in excess of 1 Lakh with 3 Lakh new cases reported every year. It was in this background that the S.L.P. petitioners who numbered 581 were all appointed (initially *ad-hoc*/daily wagers) in Class III and Class IV
E posts in connection with the T.B. Eradication Programme in the State of Bihar from the year 1980 onwards and were regularised on various dates thereafter (p. 146-166-S.L.P. paper book). By the additional affidavit dated 4.9.1994 particulars of the petitioners, their dates of *ad-hoc*/daily-rated appointments and their dates of regularisation, and (in many cases) subsequent promotion have been set out (pages 146-169 S.L.P. paper book).
F It was submitted that the initial appointments and regularisation of these employees were valid and proper. It was next submitted that by a letter dated 25th March 1988 the Joint Secretary (Health) confirmed and appointed Dr. A.A. Mallick as *ex-officio* Chairman of the Selection Committee and by a directive dated 24th July 1984 the Joint Secretary had directed
G the said Dr. Mallick to regularise the appointments made by him and to the same effect was the subsequent letter dated 17th October 1984 to the Chairman, T.B. Hospital directing regularisation of the daily wagers. In short similar contentions were sought to be raised in the written submissions as were advanced by learned advocates appearing for other appel-
H lants.

Shri Singh, learned counsel appearing for the respondent-State on the other hand submitted that all the initial appointments on *ad hoc* or daily-rated basis made by Dr. Mallick were patently unauthorised and illegal for the simple reason that though there were in all 2500 sanctioned posts, Dr. Mallick for the reasons best known to him thought it fit to appoint 6000 Class III and Class IV employees. He threw the established procedure for recruitment of such employees to the winds and in a most arbitrary manner adopting a policy of 'pick and choose' appointed these persons. These appointment were not backed up by financial budgets. They were totally unauthorised and could not have been countenanced at all. As there was nothing to show as to who could be fitted in against the sanctioned posts the State was justified on the recommendation of the Enquiry Committee to set aside all these appointments which were *ex facie* contrary to the established norms of recruitment. That as these appointments were illegal and void from their inception there was no question of regularising them and the so-called regularisation was wholly arbitrary, null and void and of no legal effect. That ample opportunity was given to these employees to put forward their contention before the Committee. Public notices were given inviting them to have their say by submitting all necessary dates before the Committee. Not only that but even 987 persons did appear before the Committee. Therefore, these was no question of violation of principles of natural justice. It was next contended by Shri Singh that there is no question of tempering justice with mercy as all these incumbents were illegally appointed by Dr. Mallick and that it was impossible to decide in the absence of relevant material or date on record as to who were senior enough to be adjusted against the sanctioned 2500 posts out of the 6000 employees. Hence the only solution to the problem was to nullify all the appointments and to start on a clean slate *de novo*. In reference to the contentions of learned counsel for the appellants placing reliance on decision of this Court in *H.C. Puttaswamy* (supra) it was submitted that in that case the initial appointments by the Chief Justice of Karnataka High Court were not illegal or unauthorised as the Chief Justice had enough financial power to create any number of post on the High Court establishment. That what was voided was the method by which the employees recruited on the High Court establishment were subsequently transferred to the establishments of subordinate courts and under these peculiar circumstances the appointees were permitted to continue in service without break. That in the present case though Dr. Mallick was

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A authorised to recruit staff on the Tuberculosis Eradication Scheme, as there were only 2500 sanctioned posts, the wholesale appointments of 6000 persons made by him were clearly illegal and an exercise in futility. It was next contended that even though these posts may not be posts born on the regular cadres in the State service they were certainly to be vacancies which were required to be supported by sufficient financial budgets and unless there were vacancies covered by the planned expenditure budgeted for the purpose, no such appointments could be effected. Under these circumstances such appointees who were illegal appointees from the very beginning could not have been regularised. So far as the submissions of Dr. Dhavan were concerned it was submitted that there were no two phases in which appointments made by Dr. Mallick. So far as he was concerned there was only one phase of recruiting persons at his whims and fancies on vacancies which did not really exist and whatever training was given to these employees also remained an exercise in futility. So far as 8 employees covered by Civil Appeal arising out of S.L.P. (C) No. 14275 of 1994 were concerned it was submitted that Dr. Mithilesh Kumar was also directed to effect appointment under instructions of Dr. Mallick and hence their appointments also stood on the same footing on which direct appointees of Dr. Mallick stood and, therefore, suffered from the same vitiating consequences. It was accordingly submitted by Shri Singh that the appeals were required to be dismissed.

In the light of the aforesaid rival contentions the following points arise for our determination :

Points for determination

1. Whether the appointments of Class III and Class IV employees on the Tuberculosis Eradication Scheme as a part of 20-Point Programme were legal and valid.

2. Whether the confirmation of these employees was legally justified.

3. Whether principles of natural justice were violated while terminating service of all these 6000 employees appointed by Dr. Mallick.

4. What relief, if any, can be granted to the appellants.

We shall deal with these points seriatim.

Point No. 1 A

So far as the initial appointments of 6000 Class III and Class IV employees by Dr. Mallick are concerned it has to be kept in view that Dr. Mallick was Director, Tuberculosis Centre at Patna. Eradication of tuberculosis was taken up as a part of 20-Point Programme under the Planned B Expenditure. The activities of the Programme were extended to various districts. It cannot be disputed that Dr. Mallick was the appointing authority for these classes of employees who had to work on the Scheme. He was duly made Chairman of the Selection Committee constituted by the Bihar State Government. The Committee consisted of Dr. Mallick, Assistant Director of Pilaria and a senior officer representing Scheduled C Castes/Scheduled Tribes. This Committee was entrusted with the task of recruiting 2250 Class III and Class IV employees. These posts were created to implement the Scheme in addition to 800-900 staff in Patna Centre in all categories. It goes without saying that the budgeted expenditure for recruitment of 2250 employees on these sanctioned posts was a planned D expenditure. As these were the only sanctioned posts under the Scheme it passes one's comprehension as to how Dr. Mallick could persuade himself to recruit 6000 employees on these 2250 sanctioned posts. Learned counsel for the appellants in written submissions tried to urge that there were more sanctioned posts while the learned counsel for the State of Bihar tried to assert that Dr. Mallick had appointed approximately 7000 persons. But as E both the learned judges constituting the Division Bench, namely, K. Ramaswamy J. and Hansaria, J. proceeded on the accepted position on record that Dr. Mallick unauthorisedly appointed 6000 employees on the sanctioned 2250 posts we will proceed on that basis. It becomes, therefore, clear that at least 3750 employees were drafted in the Scheme by Dr. Mallick F without there being any vacancies to receive them. Under these circumstances their initial entry must be held to be totally unauthorised, incompetent and void. It is axiomatic that when these recruitments were not supported by any budgetary grants there will be no occasion to make available finances to meet their salary expenses. Even apart from that, Dr. Mallick G threw all the discretion to the winds, acted as monarch of what he surveyed and in a most arbitrary fashion adopting the principle of 'pick and choose', recruited these 6000 employees completely violating the established norms and procedures for recruiting Class III and Class IV employees as laid down by the State Government from time to time. We agree with the contention of Shri Singh, learned counsel for the respondent-State that all H

these recruitments made by Dr. Mallick were arbitrary, capricious and were null and void as he did violence to the established norms and procedures for recruiting such employees. Dr. Mallick was not giving appointments to these employees on his private establishment. He was recruiting them in a Government Programme which was supported by Planned Expenditure. Such recruitment to Public services could not have been effected in such cavalier fashion in which it was done by Dr. Mallick. We are not in a position to persuade ourselves to agree with the contention of learned counsel for the appellants that the Government Order of 3rd December 1980 would not apply to these recruitments as this was a unique and distinct Scheme under 20-Point Programme. Even if it was a scheme under 20-Point Programme it was to be carried out as per planned expenditure. It is obvious that when planned expenditure is required to be incurred, budgetary sanction is a *sine qua non*. Unfortunately Dr. Mallick treated this Scheme as his private property. The device adopted by him was in flagrant violation of all norms of administrative procedure known to law. In this connection we may profitably refer to Government Order dated 3rd December 1980 which is found at page 344 of the Paper Book in Civil Appeal Nos. 10758-59 of 1995. This Government Order deals with the procedure of appointment to Class-3 Posts in Government offices. There is a similar Government Order of even date for recruitment of Class-4 services. That is annexed at page 352 in this very paper book. It is issued by the Department of Personnel and Administrative Reforms, Bihar State. As this recruitment was done in a centralised manner at Patna for different district under Tuberculosis Eradication Scheme to be carried out in all the districts in a phased manner, we may refer only to that part of this Government Order which referred to the procedure to be adopted for recruitment in Secretariat Services at Patna. It has been in terms laid down that in the Secretariat and its attached offices, a Selection Committee shall be constituted. It will be chaired by the head of the concerned establishment and one of the members of this Committee will be any senior officer as nominated by the Head of the Establishment. Other members of the Committee will be officers belonging to SC/ST working in the same department. As per this G.O. so far as recruitment to Class III posts is concerned a merit list has to be prepared on the basis of marks obtained by the candidates at school or college examinations and appointment to the vacant posts will be made according to the instructions enclosed with the concerned Resolution. The vacancies will have to be communicated to the nearest Employment Exchange of respondent areas wherein the con-

cerned offices exist. So far as G.O. concerning recruitment to Class IV servants is concerned, the Committee appointed for the purpose has to publish the advertisement through the Employment Exchange as per the direction contained in Appointment Department Circular No. 8160 dated 21st June 1966. Government instructions regarding reservation for SC/ST also have to be adhered to. It is not in dispute that none of these instructions and the procedure laid down for recruiting Class III and Class IV employees were followed by Dr. Mallick while recruiting *ad hoc*/daily wage employees at the initial stage in the Tuberculosis Eradication Scheme supervised and monitored by him. However, learned counsel for the appellants vehemently submitted that these two Government Orders would not apply and what applied for these recruitments was the Government Resolution dated 25th March 1983. It is found at page 404 of the paper book in these civil appeal. The said Resolution of the Bihar Government the Health Department issued under the signature of Joint Secretary to the Government shows that in supersession of all the previous orders, the State Government had decided to constitute Selection Committee for regular appointment against the posts of class III and Class IV under Malaria, Filaria and T.B. Programme. The officers noted against their names would function as Chairman and members. A mere look at this Resolution shows that it indicates the appointing authorities who have to recruit staff on the concerned programme mentioned therein. Dr. Mallick would necessarily therefore, be the Chairman of the Tuberculosis Control Programme Recruitment Committee. But the very Resolution indicates that recruitment had to be for regular appointments to be made by the Selection Committee to Class III and Class IV posts under Malaria, Filaria and T.B. Programme. Therefore, recruitment was to be done in a regular manner against available posts. It never gave a blanket power to Dr. Mallick to create new costs which were not sanctioned and to make recruitment thereon. Nor did it give any authority to throw the recruitment procedure for recruiting such Class III and Class IV employees to the winds and to make recruitment in an arbitrary manner at his whims and fancies. Nowhere this Resolution indicates that the earlier Government Orders laying down the procedure regarding recruitment to Class III and Class IV posts were to be given a go-by. Consequently the Resolution of 25 March 1983 has to be read along with the Government Orders dated 3rd December 1980 and not *de hors* them. The supersession of the previous orders as

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A contemplated by the Resolution of 25th March 1983 was only to the limited extent that the Selection Committee mentioned in the said Resolution will be the Committee for appointing such persons on the concerned programmes and to that extent the recruiting authority as mentioned in the earlier Government Orders would be superseded but it did nothing more than B that. The procedure for recruitment, however, would remain the same even for the newly constituted Selection Committee as per the Resolution of 25th March 1983. Consequently it is not possible to agree with the contention of learned counsel for the appellants that this Resolution of 25th March 1983 displaced and gave a send-off to the recruitment procedure C laid down by the Government Orders of 3rd December 1980. It is also equally not possible to agree with the contention of learned counsel for the appellants that as the recruitment was to be made on Tuberculosis Eradication Scheme under 20-Point Programme and the appointments were to be made to posts on any regular cadre of Bihar State Service the recruitment procedure laid down by earlier Government Orders of 3rd December 1980 D would not stand attracted. It is easy to visualise that though the vacancies or posts, as the case may be, may not be in the regular Bihar State Service but would be in the concerned programmes or schemes, nonetheless there would have to be recruitment to the sanctioned vacancies necessarily backed up by the financial budget support, to be made available by the E State as per 20-Point Programme under its liability to contribute towards the same along with Central Government. It is axiomatic that unless there is vacancy there is no question of filling it up. There cannot be an employee without a vacancy or post available on which he can work and can be paid as per the budgetary sanctions. It appears that Dr. Mallick suffering from F wrong notions of power and authority under the said Government Resolution and without bothering to find out whether there were vacancies or not under the Scheme indulged in self-help to recruit as many Class III and Class IV employees as suited him and the result was that he loaded a dead weight of burden of these employees on the State Exchequer by resorting to a completely unauthorised exercises. The State authorities were justified G in refusing to release salaries for paying this unauthorised army of staff which represented a host of unwelcome guests. They were all *persons non grata* and were not employees in the real sense of the terms. It must, therefore, be held that the appointments of 6000 employees as made by Dr. Mallick in the Tuberculosis Eradication Scheme were *ex facie* illegal. H As they were contrary to all recognised recruitment procedures and were

highly arbitrary, they were not binding on the State of Bihar. The first point for determination, therefore, will have to be answered in the negative. A

Point No. 2

So far as the question of confirmation of these employees whose entry itself was illegal and void, is concerned, it is to be noted that question of confirmation or regularisation of an irregularly appointed candidate would arise if the concerned candidate is appointed in an irregular manner or on *ad hoc* basis against an available vacancy which is already sanctioned. But if the initial entry itself is unauthorised and is not against any sanctioned vacancy, question of regularising the incumbent on such a non-existing vacancy would never survive for consideration and even if such purported regularisation on confirmation is given it would be an exercise in futility. It would amount to decorating a still-born body. Under these circumstances there was no occasion to regularise them or to give them valid confirmation. The so-called exercise of confirming these employees therefore, remained a nullity. Learned counsel for the appellants invited our attention to the chart showing the details of appointments of the concerned appellants as found at Annexure XXII at pages 243 to 253 of the paper book and also as a specimen a subsequent order of confirmation as found at page 256 in the case of Ashwani Kumar. It was submitted that such confirmation orders were also given to number of employees who were initially appointed as daily wagers/T.B. Assistants by Dr. Mallick. Our attention was also invited to the letter of Joint Secretary Shri Anant Shukla written to the Superintendent, T.B. Hospital, Koelwar, Bhojpur on 17th October 1984 which is found as Annexure-X at page 127 of the paper book to show that steps were taken for ratification of the orders of appointment of the daily wage employees as per the direction of Deputy Director, T.B./Health Services, Bihar. As we have seen earlier when the initial appointments by Dr. Mallick so far as these daily wagers were concerned, were illegal there was no question of regularising such employees and no right accrued to them as they were not confirmed on available clear vacancies under Scheme. It passes one's comprehension as to how against 2500 sanctioned vacancies confirmation could have been given to 6000 employees. The whole exercise remained in the realm of an unauthorised adventure. Nothing could come out of nothing. *Ex nihilo nihilo fit.* Zero multiplied by zero remained zero. Consequently no sustenance can be drawn by the appellants from these confirmation orders issued to them by Dr. Mallick on the basis of the directions issued by the concerned authorities at the relevant time. It would amount to regularisation of back B C D E F G H

A door entries which were vitiated from the very inception. It is not possible to agree with the contention of learned counsel for appellants that the vacancies on the Scheme had nothing to do with regular posts. Whether they are posts or vacancies they must be backed up by budgetary provisions so as to be included within the permissible infrastructure of the Scheme. Any posting which is *dehors* the budgetary grant and in a non-existing
B vacancy would be outside the sanctioned scheme and would remain totally unauthorised. No right would accrue to the incumbent of such an imaginary or shadow vacancy.

In this connection it is pertinent to note that question of regularisa-
C tion in any service including any Government service may arise in two contingencies. Firstly, if on any available clear vacancies which are of a long duration appointments are made on *ad hoc* basis or daily wage basis by a competent authority and are continued from time to time and if it is found that the concerned incumbents have continued to be employed for a long period of time with or without any artificial breaks, and their services are
D otherwise required by the institution which employs them, a time may come in the service career of such employees who are continued on *ad hoc* basis for a given substantial length of time to regularise them so that the concerned employees can give their best by being assured security of tenure. But this would require one pre-condition that the initial entry of
E such an employee must be made against an available sanctioned vacancy by following the rules and regulations governing such entry. The second type of situation in which the question of regularisation may arise would be when the initial entry of the employee against an available vacancy is found to have suffered from some flaw in the procedural exercise though
F the person appointing is competent to effect such initial recruitment and has otherwise followed due procedure for such recruitment. A need may then arises in the light of the exigency of administrative requirement for waiving such irregularity in the initial appointment by competent authority and the irregular initial appointment may be regularised and security of tenure may be made available to the concerned incumbent. But even in
G such a case the initial entry must not be found to be totally illegal or in blatant disregard of all the established rules and regulations governing such recruitment. In any case back door entries for filling up such vacancies have got to be strictly avoided. However, there would never arise any occasion for regularising the appointment of an employee whose initial entry itself
H is tainted and is in total breach of the requisite procedure of recruitment

and especially when there is no vacancy on which such an initial entry of the candidate could ever be effected. Such an entry of an employee would remain tainted from the very beginning and no question of regularising such an illegal entrant would ever survive for consideration, however competent the recruiting agency may be. The appellants fall in this latter class of cases. They had no case for regularisation and whatever purported regularisation was effected in their favour remained an exercise in futility. Learned counsel for the appellants, therefore, could not justifiably fall back upon the orders of regularisation passed in their favour by Dr. Mallick. Even otherwise for regularising such employees well established procedure had to be followed. In the present case it was totally by-passed. In this connection we may profitably refer to Government Order dated 31st December 1986 to which our attention was invited by learned counsel for the appellants. The said Government Order is found in the additional documents submitted in C.A. Nos. 10758-59 of 1995 at Annexure-IV Secretary to Government of Bihar, Health Department, by Communication dated 31.12.1986 had informed all regional Deputy Directors. Health Services; Tuberculosis Civil Surgeon-cum-Chief Medical Officer; and other concerned authorities in connection with the compliance and implementation of the others passed and instructions issued by Deputy Director (Tuberculosis) Bihar, Patna under the Tuberculosis Control Programme covered under the 20-Point Programme. It was stated in the said communication that steps will be taken to fill up sanctioned third and fourth Grade posts as soon as possible according to the prescribed procedure and all possible efforts should be made to achieve the fixed targets in a planned and phased manner. Even this letter clearly indicates that the posts had to be filled up by following the prescribed procedure. Despite all these communications neither the initial appointments nor the confirmations were done by following the prescribed procedure. On the contrary all efforts were made to bypass the recruitment procedure known to law which resulted in clear violation of Article 14 and 16(1) of the Constitution of India both at the initial stage as well as at the stage of confirmation of these illegal entrants. The so-called regularisations and confirmations could not be relied on as shields to cover up initial illegal and void actions or to perpetuate the corrupt methods by which these 6000 initial entrants were drafted in the Scheme by Dr. Mallick. For all these reasons, therefore, it is not possible to agree with the contention of learned counsel for the appellants that in any case the confirmations given to these employees gave

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A them sufficient cloak of protection against future termination from services. On the contrary all the cobwebs created by Dr. Mallick by bringing in this army of 6000 employees under the Scheme had got to be cleared lock, stock and barrel so that public confidence in Government administration would not get shattered and arbitrary actions would not get sanctified.

B

We may also at this stage refer to additional written submissions filed on behalf of the appellants in C.A. Nos. 10831-10985. In these written submissions reliance is placed on the judgment of one of us, A.M. Ahmadi, J. (as His Lordship then was), in the case of *Jacob M. Puthuparambil & Ors Etc. Etc.* v. *Kerala Water Authority & Ors. Etc. Etc.,* [1991] 1 SCC 28.
C In the said decision it was held that when *ad hoc* employees who were continued for two years or more (in some cases one year or more) were entitled to be regularised subject to availability of vacancies. The aforesaid decision cannot be of any avail to the appellants for the simple reason that once we find that there were no vacancies at all on which the appellants could be regularised there was no occasion to undertake such an exercise
D especially when the initial entries of these appellants in the service were found to be illegal and vitiated.

Before we leave discussion on point No. 2 it is necessary to mention two additional aspects placed for our consideration by Dr. Dhavan in
E support of the appellants. In Civil Appeal Nos. 10811-28 of 1995 Dr. Dhavan submitted that there were two phases in connection with recruitment for Tuberculosis Eradication Programme. One phase was as per Government Order of 25th March 1983 wherein the committee of recruitment headed by Dr. Mallick was entrusted with the task of recruitment.
F But the second phase started on 31.1.1987 when Joint Secretary to Government of Bihar, Health Department addressed a communication to the Deputy Director, Tuberculosis, Dr. Mallick. The said communication is found as Annexure V to the paper book in Civil Appeal No. 10811-28 of 1995. It mentions that the signatory to the communication was directed to say that keeping in view the necessity of one T.B. Assistant and T.B.
G Attendant for each of the 627 Primary Health Centres, a training programme should be launched for training the candidates in proportion to the number of Primary Health Centres, which will consist of such available trained candidates who will have to compulsorily participate in a final examination conducted by the Director, State T.B. Demonstration and
H Training Centre and shall have pass such examination so that they may be

posted in the Primary Health Centres in order of merit from the list of trained candidates after approval of sanction of posts by the Government in phases. Dr. Dhavan contended that pursuant to the said direction Dr. Mallick appointed number of candidates under the Training Programme and these candidates were trained for being ultimately absorbed in primary health centres under the Scheme. We fail to appreciate how this communication which is styled as beginning of the second phase by Dr. Dhavan, can change the situation. Even though some training was given under the direction of the Government to certain candidates the recruitment made by Dr. Mallick in excess of the available vacancies would still remain unauthorised and illegal and cannot improve the situation for the said trainees in any manner. Even after training when recruitment is to be made it must be made on available vacancies or sanctioned posts under the Scheme and that too after following due procedure of recruitment. That was never done by Dr. Mallick. Therefore, the so-called second phase cannot improve the position for the appellants in any manner. Dr. Dhavan then submitted that at least so for as 8 appellants in Civil Appeal arising out of S.L.P. (C) No. 14275 of 1994 are concerned, they were not appointed by Dr. Mallick but were appointed by Dr. Mithilesh Kumar. In para 3 of S.L.P.(C) No. 14275 of 1994 it has been stated that one letter was issued by the then Deputy Director (T.B.), Dr. Mallick on 23rd November 1989 by which the Civil Surgeon-cum-Chief Medical Officer. Madhubani was directed to absorb petitioner No. 2 according to his qualification against a Class III post and accordingly he was appointed. At page 83 is found the recital as regards petitioner Nos. 7 and 8, to the effect that with respect to them Dr. Mallick, the then Deputy Director (T.B.) Health Services issued one letter dated 12th January 1990 recommending for their absorption against Class III posts according to their qualification and that is how they were appointed by Dr. Mithilesh Kumar. It was next submitted with reference to paragraph 13 of the same Special Leave Petition that with respect to the appointments which were made by then Civil Surgeon-cum-Chief Medical Officer, Madhubani, like the petitioners a separate letter was issued on 6th March 1993 wherein the incharge Medical Officers of Primary Health Centres were directed to issue show cause notices to such persons, who were appointed/absorbed by the order of the then Civil Surgeon-cum-Chief Medical Officer, but such show cause notices were never issued. In our view these averments cannot improve the case of the

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A appellants. Even though these concerned petitioners might have been actually appointed by Dr. Mithilesh Kumar their appointments were recommended by Dr. Mallick who, therefore, remained the prime mover in their cases also as in cases all other appellants. It is the hand of Dr. Mallick that brought them under the Tuberculosis Eradication Scheme and B but for him they would not have got their entry. Therefore, actual appointments might have been made by Dr. Mithilesh Kumar but the real appointing agency remained that of Dr. Mallick. Consequently the effort made by Dr. Dhavan to separate their cases from the cases of other appellants who are tracing their direct linkage with Dr. Mallick remained an abortive one. C Similarly whether show cause notices were issued to them or not also would be besides the point as we will see while deciding point No. 3 that public notices were given to appointees to have their say before the competent authority in connection with their appointments and basic principles of natural justice were followed in these cases also. The second point, therefore, is answered in the negative. This takes to the consideration of Point D No. 3 for determination.

Point No. 3

So far as the principles of natural justice are concerned it has to be E stated at the outset that principles of natural justice cannot be subjected to any straight jacket formula. They will vary from case to case, from circumstance to circumstances and from situation to situation. Here is a case in which 6000 employee were found squatting in the Tuberculosis Scheme controlled and monitored by Dr. Mallick for the entire State of F Bihar and there was no budgetary sanction for defraying their expenditure. At least out of the 6000 employees as seen earlier 3750 were totally unauthorised and were squatting against non-existing vacancies. A grave situation had arisen which required immediate action for clearing the stables and for eradicating the evil effects of these vitiated recruitments so that the Tuberculosis Eradication Scheme could be put on a sound footing. G When such a grave situation had arisen and when matters had gone up to the High Court wherein the State was directed to appoint a Committee to thoroughly investigate the entire matter, the State of Bihar had to appoint a Committee to scrutinise these appointments and to filter them as directed by the High Court of Patna. For undertaking the said exercise public H notices were issued by the Director-in-Chief, Health Service, Bihar, Patna

by communication dated 4th July 1992. The said communication which is found at page 147 of the paper book recites that Dr. Mallick, the then Deputy Director (T.B.) presently retired, issued orders of appointment/posting/transfer/absorption on a large scale against the Class III and Class IV posts in the T.B. Eradication Programme under the Directorate of Health Services without following the procedure for appointments/without publication of advertisement and by openly violating reservation policy in contravention of Article 16. While distributing such appointment letters. Dr. Mallick in many cases did not even care to see whether even the posts were sanctioned or not. Reference was made to the order passed by High Court of Patna which had directed the Government to enquire into all such matters and after considering the representations, pass a final order within 6 weeks. It was in the light of the Patna High Court's direction that the Government called upon all the concerned persons to submit their representations, show causes replies before the signatory to the communication positively by 25th July 1992 so that appropriate decision might be taken after examining the legality of their appointments. Six types of informations were sought for from the concerned persons. The employees appointed from 1980 to 1987 were called upon to appear before the Director-in-Chief, Health Services, Bihar, Patna in his office situated at Vikas Bhawan, Secretariat at 11.00 a.m. positively with a copy of show-cause reply on different dates ranging from 17th August 1992 to 19th September 1992 and the employees appointed from May 1988 to December 1988 and from January 1989 to December 1989-90 were to appear in person on 29th September 1992. It is not in dispute that pursuant to the aforesaid communication duly published, out of 6000 employees who were the creatures of Dr. Mallick, 987 did appear. The appellants in C.A. Nos. 10758-59 of 1995 and others did submit details of their service bio-data to the concerned authority as per the said communication. A sample copy of the show cause reply sent to the Director-in-Chief, Health Service, in response to the said communication is at page 151 of the paper book. Querywise replies are found in the said return. It was thereafter that a written order was passed by Director-in-Chief on 12th November 1992 appointing a committee of officers for scrutinising these replies and for coming to the correct conclusion in the light of the data supplied by the concerned employees who remained present for personal hearing before the authority in response to the earlier communication. The

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A said order dated 12th November 1992 is at page 402 of the paper book. It clearly recites that after due consideration of all the facts, the Government had decided that the validity of all the appointments made by Dr. Mallick after 1.1.1980 should be examined. Accordingly all the concerned officials were given opportunity to submit show cause replies before the Director-
B in-Chief, Health Service Bihar, Patna by 25.7.92, after getting the notice to show cause advertised on 4.7.92 and also were given opportunity for personal hearing after fixing separate dates for officials appointed yearwise from 1980 till August-September 1992. A committee of the officers mentioned in paragraph 4 was appointed to review the show cause replies
C mentioned in paragraph 3 and information received in course of personal hearings. The committee had to review the merits/demerits of the appointments under question in the light of policy and procedures prescribed by Government from time to time for appointment in Public Service and submit its recommendation to the Government. The learned counsel for
D the appellants submitted that appointment of this review committee was after the personal hearing before the Director-in-Chief. Health Service, Bihar, Patna and therefore, this violated the basic principles of natural justice. It is difficult to agree. All the concerned appointees whose appointments by Dr. Mallick were to be filtered were given personal hearing by
E the Director-in-Chief. The data which they had to submit was duly received and it was thereafter that the Review Committee was entrusted with the task of going through the data submitted by these employees along with their replies and their say during the personal hearing. Therefore, the said Review Committee was only to scrutinise the data collected during the personal hearing by the Director-in-Chief, Health Service and on that basis
F the Committee decided the question of legality and validity of their appointments. Thus the basic principles of natural justice cannot be said to have been violated by the committee which ultimately took decision on the basis of the personal hearing given to the concerned employees and after considering what they had to say regarding their appointments. Whatever
G was submitted by the concerned employees was taken into consideration and then the committee came to a firm decision to the effect that all these appointments made by Dr. Mallick were vitiated from the inception and were required to be set aside and that is how the impugned termination orders were passed against the appellants. On the facts of these cases,
H therefore, it cannot be said that principles of natural justice were violated

or full opportunity was not given to the concerned employees to have their say in the matter before their appointments were recalled and terminated. Point No. 3 is, therefore, is answered in the negative.

Point No. 4

Now is the time for us to take stock of the situation in the light of our answers to the aforesaid three points. As a logical corollary to these answers the appeals are liable to be dismissed as the decision of the High Court is found to be well sustained. The submission made by learned counsel for the appellants to sustain services of these appellants on humanitarian grounds cannot be countenanced. When 6000 appointees are found to have been illegally loaded on the State exchequer by Dr. Mallick and when there were only 2250 sanctioned posts, in the absence of clear data as to who were the senior most and which were the sanctioned posts available at the relevant time against which they could be fitted it would be impossible to undertake even a jettisoning operation to offload the removable load of excess employees amounting to 3750 by resorting to any judicial surgery. Once the source of their recruitment is found to be tainted all of them have to go by the board. Nor can we say that benefit can be made available only to 1363 appellants before as the other employees similarly circumscribed and who might not have approached the High Court or this Court earlier and who may be waiting in the wings would also be entitled to claim similar relief against the State which has to give equal treatment to all of them otherwise it would be held guilty of discriminatory treatment which could not be countenanced under Articles 14 and 16(1) of the Constitution of India. Everything, therefore, must start on the clean slate. Reliance placed by learned counsel for the appellants on the doctrine of tempering justice with mercy also cannot be pressed in service on the peculiar facts of these cases as mercy also has to be based on justice. The decision of this Court in the case of *H.C. Puttaswamy* (supra) also can be of no assistance to the appellants on the facts of the present cases as in that case the Chief Justice of the High Court had full financial powers to create any number of vacancies on the establishment of the High Court as required and to fill them up. There was no ceiling on his such powers. Therefore, the initial entry of the appointees could not be said to be unauthorised or vitiated or tainted. The fault that was found was the manner in which after recruitment they were passed on to the establishments to subordinate courts. That exercise remained vitiated. But as the

A original entries in High Court service were not unauthrised these candidates/employees were permitted to be regularised. Such is not the present case. The initial entry of the employees is itself unauthorised being not against sanctioned vacancies nor was Dr. Mallick entrusted with the power of creating vacancies or posts for the schemes under the Tuber-
B culosis Eradication Programme. Consequently the termination of the services of all the these appellants cannot be found fault with. Nor any relief as claimed by them of reinstatement with continued service can be made available to them.

However there is one human aspect which calls for our attention on
C the facts of the present cases. These 6000 employees got employed by Dr. Mallick over at least a decade. Many of them served for number of years and got confirmed. They would naturally have their families to support. For no fault of theirs they found themselves stranded in life midstream. Many might have got overaged. As Dr. Dhavan pointed out, many of them also
D got trained under the second phase of the Programme, as he would like to style it, pursuant to the Government Order dated 31.1.1987 referred to by us earlier. Under these circumstances justice would require that some effort to salvage their situation if possible may be made when the State undertakes a fresh exercise to fill up the sanctioned posts under the Tuberculosis Eradication Programme which has come to stay. We are
E informed that tuberculosis is still not eradicated in the State of Bihar and the Programme is to last for couple of more years and may be it may assume a semi-permanent status. It was also not disputed that there are 2250 sanctioned posts or it may be that some more sanctioned posts may see the light of the day in near future. Shri Singh learned counsel for the
F respondent-State informed us that the State proposes to start on a clean slate and after following due procedure of recruitment would certainly recruit Class III and Class IV employees on the sanctioned vacancies and posts which will have to be filled up for making the Tuberculosis Eradication Scheme effective and fully operative. When that is the need of the day,
G it would be appropriate to direct the State to undertake that exercise at the earliest and while doing so after following the due procedure of recruitment and the rules government the same, give an opportunity to these 6000 unfortunate creatures of Dr. Mallick to compete for the said posts in the future recruitment that may be undertaken by the State and in the process because of the experience which they have gathered in their
H past service under the Tuberculosis Programme and the training which they

might have received pursuant to the Government Order dated 31.1.1987, due weightage also be given to them while considering their eligibility for being recruited in service as and when such future exercise is undertaken. Consequently we deem it fit to issue the following directions to the respondent State of Bihar in this connection :

1. Respondent-State of Bihar may start at the earliest a fresh exercise for recruiting Class III and Class IV employees in the Tuberculosis Eradication Programme undertaken by the State as a part of 20-Point Programme on the available 2250 vacancies or even more vacancies, as the case may be, preferable within three months from the receipt for a copy of this order.

2. Towards the said exercise the State will publish a notice in all the newspapers having circulation in the State inviting applications for direct recruitment to Class III and Class IV posts for filling up these vacancies in the said Programme.

3. Similarly names may also be called for from the concerned Employment Exchange for such recruitment.

4. If no statutory body composed of high-ranked officials for recruitment to Class III and Class IV employees is in vogue, the State is directed to constitute a committee consisting for three members, viz., (a) a member of the Public Service Commission : (b) a senior IAS officer, i.e., the Additional or Joint Secretary of the Health Department; and (c) a senior officer, i.e., the Director or Additional Director of Health Service, to select the candidates. The Additional or Joint Secretary of Health Department shall be the Chairman of the Committee.

5. The respondent-State will constitute such a committee preferably within three months of the receipt of this order.

6. It would be open to all the appellants or those appointed by Dr. Mallick who might not have challenged their termination orders before any competent court uptill now, to apply for selection to the concerned Class III and IV posts. The committee would in their cases as first step, verify and satisfy itself of the credentials of such candidates whether they were appointed by Dr. Mallick and had worked at least for three years continuously. The committee would also satisfy itself that such candidate or

A candidates honestly and meritoriously discharged their duties as Class III and Class IV appointees, at least for the said period.

7. The committee may fix total number of marks to be obtained by the candidates for being treated to have passed the selection test. Any relaxation in the minimum eligibility marks to be obtained by the Scheduled
B Castes. Scheduled Tribes and Other Backward Classes candidates as found necessary may also be decided by the Committee. The committee if satisfied about the credentials and other particulars of the appellants or those appointed by Dr. Mallick as mentioned in paragraph (6) above, may allot additional marks to them for each of the three years and more for which
C they might have worked, at the rate of 2 marks for each completed year of continuous working upto the maximum of 6 marks, for each candidate. Candidates appointed by Dr. Mallick who are found to have undertaken training pursuant to Government direction dated 31.1.1987 may be awarded 2 additional marks for the training so received. Those 2 marks
D will be in addition to the 6 marks which are to be awarded on completion of meritorious and honest service by the concerned employees as mentioned above.

8. If the concerned candidates who were earlier appointed by Dr. Mallick are found by the committee to be otherwise eligible for being
E appointed to Class III and Class IV posts as per the relevant rules and regulations and if on the basis of the marks allotted to them as aforesaid they become eligible to be appointed besides other competing candidates, then if they are found to have become age barred the condition of age for recruitment of such candidates should be relaxed appropriately so as to
F entitle such candidates to be considered for selection.

9. The State Government shall arrange sittings of the Selection Committee preferably within two months from the last date prescribed for submitting the applications and for completion of the preliminary scrutiny of such applications. The committee shall select all candidates on merits
G following the prescribed procedure in the appropriate circulars and rules and shall also follow the rules of reservation as in vogue and prepare the merit list and should submit it to the government. While doing so the eligible candidates who were earlier appointed by Dr. Mallick and who received the marks for their past meritorious service and training as
H aforesaid will be considered for selection qua the other candidates in the

light of the weightage of the marks as aforesaid and in that light the committee will select all the candidates on merits and will prepare the select list of candidates found fit to be appointed to the concerned posts.

10. The committee will complete the process of selection preferably within three months from the date of its sittings for selection.

11. An appropriate authority or the government, as the case may be, will appoint preferably within three months from the date of the receipt of the merit list from the committee, the selected candidates as per roster and the merit list, on available vacancies, after due identification of the credentials of the candidates concerned as per its legally permissible procedure.

12. In the event of selection and appointment of erstwhile daily-rated employee or employees, who were inducted by Dr. Mallick, the entire proved period during which they had worked as daily wager and/or confirmed employees will be computed for the purpose of pensionary and other retrial benefits but they will not be entitled to claim any *inter se* higher seniority in the selection made by the committee or for any promotion on the basis of their previous service.

The appeals are disposed of in the above terms. In the facts and circumstances of the case there will be no order as to costs.

R.A. Appeals dismissed of.